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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 989

PAUL F. PERATI, et al.,
Petitioners
vs.
UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Petitioners Petition for a Rehearing

PAUL F. PERATI
6110 Aspinwall Road
Oakland, California 94611
In Propria Persona

SORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

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Petitioner, (appellant below) in the above entitled petition for a writ of certiorari, filed in this court, and on which a decision was rendered and entered on March 28th, 1966, respectfully requests a rehearing, and prays that a writ of certiorari be issued out of and under the seal of this Court, directed to the United States Court of Appeals, for the Ninth Circuit, San Francisco, California, to the end that this case may be reviewed and determined by this Court, on the following grounds:

I

PETITIONERS LAND (the land in issue) IS NOT AND HAS NOT BEEN WITHIN THE EXTERIOR BOUNDARIES OF YOSEMITE NATIONAL PARK, Since February, 1905, when 33 Stat. 702, c. 547, sec. 1, also cited as, sec. 46, of Title 16, U.S.C., "Yosemite National Park; *lands segregated from and included* in Sierra National Forest;" was enacted, all of which appears from the following:

To paraphrase the above, we have a legislative mandate that all of the land described in section 471c U.S.C. Tit. 16 but not included within the metes and bounds of the land hereinafter described are included and made a part of the Sierra National Forest, code description follows .....

The above described lands are SUBJECT TO (dependent on) all the provisions of sections 61, 471c and 471d, Tit. 16 U.S.C. Thus, the metes and bounds "thence northerly along section lines through the middle of townships 3 and 4 south, range 20 east, to the northwest corner of section 3, township 3 south, range 20 east, to the northwest corner of section 3, township 3 south, range 20 east;" *is conditioned on and subject to the provision in section 471c.*

This petitioners (marked for identification, see page 19) Rept. Trans. Exhibit A, executed by President Grover Cleveland, (and offered in evidence on January 20, 1964, but refused, see page 4, reporters transcript) clearly established a PENINSULA of land in section 3 (which contains the subject land in issue) and this PENINSULA is firmly attached to portions of land in sections 4 and 9, T. 3 S., Range 20 E., and this was within the power of the Honorable Grover Cleveland, President of the United States.

(See the complaint, filed May 28th, 1962, page 5, vol. one Transcript of Record, filed in the District Court,

wherein the Government pleads the subject land is in the County of Mariposa, State of California, Townsite of Foresta, but does not plead that the land is within the exterior boundaries of Y.N.P., nor did the Government amend the complaint to include this).

The last sentence of the above cited section 46, provides as follows "THE FOREST LANDS HEREIN SET ASIDE AND RESERVED SHALL BE KNOWN AS THE 'YOSEMITE NATIONAL PARK'."

Thus, my land is not within the boundaries, by act and operation of law. *This is a matter that the Government was under a duty to establish in the trial court if it were able to change its theory from the one pleaded in the complaint, to a different theory, and plead its authority to take was due to and flowed from the Appropriation Act.*

II

The Government's position (page 5, Brief for the United States in Opposition) "that the failure to plead in the condemnation complaint that the land involved is within the exterior boundaries of the Park was cured as the Secretary of the Interior in the declaration of taking, determined that these lands were situated within the boundaries of the Yosemite National Park, California."

Associate Justice John M. Harlan, 1958, in *United States v. Dow,* 357 U.S. 17, 23, states the rule is as follows: "The Taking Act does not bestow independent authority to condemn lands for public use. On the contrary, it provides a proceeding "ancillary or incidental to suits brought under other statutes".

Thus, it is clear, that the Taking Act, 40 U.S.C. 258a, cannot fill in deficiencies or change the theory of a con-

demnation complaint filed and at issue under Rule 71A, Federal Rules of Civil Procedure.

III

After an answer is filed, and the complaint is at issue, may a complaint change the theory of the case without amending the complaint?

In the instant case, the United States in the complaint filed under Rule 71A, Federal Rules of Civil Procedure (C)(2), pleaded its authority for the taking was 40 U.S.C. 258a; and the ACT OF OCTOBER 1, 1890 (26 Stat. 650), AND ACTS SUPPLEMENTARY THERETO AND AMENDATORY THEREOF AND THE DEPARTMENT OF THE INTERIOR AND RELATED AGENCIES APPROPRIATION ACT, 1962, APPROVED AUGUST 3, 1961 (75 Stat. 246), *WHICH MAKES FUNDS AVAILABLE FOR SUCH PURPOSE;*

Thus, the theory of the complaint that the authority for the taking was the Act of October 1, 1890, and that the Appropriation Act, 75 Stat. 246, made funds AVAILABLE FOR THE PURPOSE OF 26 Stat. 650, was changed after the answer was in, and it was clear that the Act of 26 Stat. 650 was not authority for the complaint, to a theory that the authority for the taking FLOWED FROM AND WAS VESTED IN the Appropriation Act, 75 Stat. 246.

Thus in practice and effect, this petitioner was not in a position to file a complete answer as allowed by Rule 71A(e) and the judgments of the District Court, and the U.S. Court of Appeals being outside of, and in excess of the issues established by the pleading titled Complaint in Condemnation, was in excess of jurisdiction, and should be reversed.

Pages 3 and 4 of the Reporter's transcript, dated January 20, 1964, establishes that we contested the position of the Government at every step.

Respectfully,

/s/ PAUL F. PERATI
Paul F. Perati

CERTIFICATION

Petitioner certifies that the within petition for a rehearing is presented in good faith, and not for delay, and further certifies that the petition is to be restricted to the grounds that:

1. The land in issue has not been within the exterior boundaries of Yosemite National Park since February, 1905, and that the Government did not plead in its complaint, or establish, that the land in issue was within the Park boundaries.
2. A Declaration of Taking cannot cure defects in a complaint in condemnation.
3. In the absence of an amended complaint, when it is pleaded in the complaint, that the authority for the condemnation is based upon and thus flow from 26 U.S. Stat. 650, and it is alleged that the Appropriation Act 75 U.S. Stat. 246 makes funds available for the purpose of 26 Stat. 650, it is outside the issues to hold the authority for the taking flows from the Appropriation Act.

Respectfully,

/s/ PAUL F. PERATI
Paul F. Perati
In Propria Persona